

Supreme Court, U. S.

FILED

MAR 3 1978

MICHAEL PODAK, JR., CLERK

In The  
**Supreme Court of the United States**

No. ... **77** - 1508

MARIE GUST,

*Petitioner,*

v.

U.S. CUSTOMS SERVICE,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
JUDGMENT OF THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

MURRAY R. FELDMAN  
*Attorney for Petitioner*

202 Travelers Tower  
Southfield, Michigan 48076

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IN THE  
**SUPREME COURT  
OF THE UNITED STATES**  
ON APPEAL  
FROM THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT

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MARIE GUST,  
Plaintiff,  
vs.  
U.S. CUSTOM SERVICE,  
Defendant.

District Court  
No: 75-70328  
Court of Appeals  
No: 76-1762

**PETITION FOR CERTIORARI**

NOW COMES the above-named Plaintiff-Appellant-Petitioner, by and through her attorneys, GOLDSTEIN, MEKLIR & FELDMAN, P.C., and submits the following Petition for Certiorari, petitioning this Honorable Court to grant a Writ of Certiorari and allow oral argument for the following reasons and based upon the following facts:

**A.**

A reference to the official and unofficial reports of the opinions delivered in the Courts below, if any, and if reported. Any such opinion shall be appended as provided in sub-paragraph (1) hereof.

Plaintiff-Appellant-Petitioner appeals from an initial determination by the Honorable John Feikens, United States District Judge and the Eastern District of Michigan, Southern Division, rendered as a result of a De Novo Hearing held on December 5, 1975. The United States District Court case bore the File No: 75-70328. That Hearing was as a result of a Memorandum Opinion issued by Judge Feikens, granting the Plaintiff the right to a De Novo Hearing, dated September 19, 1975.

Copies of both the Opinion of September 19, 1975 and the Opinion of December 5, 1975, are attached hereto.

Based on Judge Feiken's Memorandum Opinion of December 5, 1975, an appeal was taken by the Plaintiff-Appellant to the United States Court of Appeals for the Sixth Circuit. Oral argument was held on that appeal and an opinion was rendered by the United States Court of Appeals, Sixth Circuit on January 4, 1978. The Court of Appeals case bore the No: 76-1762.

That Opinion rendered by the Three Judge Panel who heard oral argument, affirmed the decision of Judge Feikens in the United States District Court and this Petition for Certiorari is based upon said affirmance.

Plaintiff-Appellant-Petitioner does not believe, as of this date, that the Opinions either of Judge Feikens in the United States District Court for the Eastern District of Michigan, or the Opinion in the United States Court of Appeals for the Sixth Circuit have yet been reported.

#### **B.**

**A concise statement of the grounds on which the jurisdiction of this Court is invoked, showing:**

i. The date of the Judgment or Decree sought to be reviewed and the time of its entry;

ii. The date of any Order expecting a Rehearing, and the date and terms of any Order Granting an Extension of Time within which to Petition for Certiorari; and

iii. The statutory provision believed to confer on this Court jurisdiction to review the Judgment or Decree in question by Writ of Certiorari.

Plaintiff-Appellant-Petitioner, invokes the jurisdiction of this Court based on the protections of the First Amendment to the United States Constitution assuring all citizens equal treatment regardless of their religious beliefs. It is the position of Plaintiff-Appellant-Petitioner that her dismissal from the U.S. Customs Service was as a result of religious discrimination, she being a follower of the Jehovah's Witness faith.

The Judgment rendered by the Court of Appeals for the Sixth Circuit is attached hereto, and is dated January 4, 1978. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

#### **C.**

**The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the Petition or fairly comprised therein will be considered by the Court.**

Plaintiff-Appellant-Petitioner suggests to this Honorable Court that the questions presented in this Petition for a Writ of Certiorari are as follows:

a. Whether or not during the course of her employment with U.S. Customs Service, Plaintiff-Appellant-Petitioner was discriminated against on the basis of her religious beliefs, protected by the First Amendment;

b. Whether or not at or immediately before the date of her dismissal, Plaintiff-Appellant-Petitioner was discriminated against based on her religious beliefs by co-workers;

c. Whether or not the dismissal of the Plaintiff-Appellant-Petitioner, from her position with the U.S. Customs Service by her supervisor, and further the actions of the U.S. Customs Service Agency located in Chicago, Illinois, constituted religious discrimination;

d. Whether or not the facts as proved at the De Novo Hearing and the Administrative Record taken as a whole, indicate any justification, other than that of religious discrimination, by which the U.S. Customs Service can prove a rational, reasonable reason for the dismissal of Plaintiff-Appellant-Petitioner.

#### **D.**

**The constitutional provisions, treaties, statutes, ordinances or regulations which this case involves, setting them out verbatim and citing the volume and page where they may be found in the official addition. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text shall be set forth in an Appendix.**

Plaintiff-Appellant-Petitioner makes her claims under the First Amendment to the United States Constitution, which is as follows:

#### **"FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES.**

Congress shall make no law respecting an establishment of religion or prohibiting free exercise thereof; or abridging speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Since Plaintiff-Appellant-Petitioner was employed by the U.S. Customs Service, an agency of the United States Government, Plaintiff-Appellant-Petitioner believes that the First Amendment is sufficient to establish a Federal Question capable of review under 28 USC Section 1254 (1).

#### **E.**

**A concise statement of the case containing the factual material to the consideration of the questions presented.**

It is the position of the Plaintiff-Appellant-Petitioner that certain facts have been established with regard to Plaintiff-Appellant-Petitioner's employment with the Defendant U.S. Customs Service.

Plaintiff began her employment in 1962, and was removed from her position on October 5, 1973. During this period of time the Plaintiff-Appellant-Petitioner was always employed as a Clerk-Steno, graded as a GS-4.

During her employment, it is the claim of the Defendant-Appellee, U.S. Customs Service, that Mrs. Gust was a sub-standard employee, and not capable of performing the normal duties required for her position. It is the position of Plaintiff-Appellant-Petitioner that the evidence more accurately reflects



that at the time of the De Novo Hearing, no evidence was adduced on behalf of the Defendant-Appellee that Mrs. Gust ever received an unsatisfactory performance rating on a yearly rating basis, other than allegations by witnesses Aschim and Liming.

It has been and continues to be the position of Plaintiff-Appellant-Petitioner that the records of the annual performance rating should have been made available, and that based upon the testimony at the De Novo Hearing, there certainly exists no records which would indicate Plaintiff-Appellant-Petitioner received anything but a satisfactory rating.

Based upon the fact that it is the position of the Plaintiff-Appellant-Petitioner that once the allegation is made by the Plaintiff-Appellant-Petitioner that she received satisfactory performance ratings, the burden of proof shifts to the Defendant to prove otherwise, and that no adequate proof was presented to the United States District Court for the Eastern District of Michigan, Southern Division, and no further proof was adduced in the United States Appeals Court for the Sixth Circuit, which would sustain the Defendant's burden of establishing Plaintiff-Appellant-Petitioner's alleged sub-standard employment performance. Assuming then that Plaintiff-Appellant-Petitioner has established and met her burden of proof, in establishing that she was not a sub-standard employee, the next issue presented is whether or not during the course of her employment with the Defendant-Appellee, U.S. Customs Service, the Plaintiff-Appellant-Petitioner was discriminated against on the basis of her religious beliefs. In the Memorandum Opinion, rendered by Judge Feikens under date of March 15, 1976, the statement is made on page 2 . . . "The Court finds that Plaintiff's testimony accepted as true, describes at most a situation in which she was harrassed by her fellow workers because of her religious beliefs".

Assuming that fact to have been established in the De Novo Hearing before Judge Feikens, the final issue to be decided is whether or not her discharge from the U.S. Customs Service by Mr. Aschim, her direct supervisor, was a result of religious discrimination.

The United States District Court for the Eastern District of Michigan, Southern Division, per Judge Feikens, in his Memorandum Opinion previously cited held that the Plaintiff-Appellant-Petitioner "did not, however, provide her supervisors with identity of those guilty of such harrassment, and for this reason corrective action was of necessity limited to general admonitions to other employees".

It is the position of Plaintiff-Appellant-Petitioner that the supervisory personnel including Mr. Aschim and Mr. Liming, witnesses who testified at the De Novo Hearing before Judge Feikens, knew only too well, who in the office, was performing acts of discrimination upon Mrs. Gust based upon her religious beliefs, and that the failure to convey specific names, certainly was not fatal, nor did it prevent Mr. Aschim, Mr. Liming or other supervisory personnel from ensuring that the Plaintiff-Appellant-Petitioner was free from discrimination.

It is, therefore, the assertion of Plaintiff-Appellant-Petitioner that although Judge Feikens found "that Plaintiff's job performance was sub-standard and that the inadequacy of job performance was the sole reason for Plaintiff's discharge" Plaintiff-Appellant-Petitioner moves this Honorable Court to review the testimony at the time of the De Novo Hearing, and the entire administrative record, and Plaintiff-Appellant-Petitioner is convinced that the evidence does not support such a conclusion.

Therefore, it is the claim of the Plaintiff-Appellant-Petitioner that she is entitled to a judgment for back pay from the date

of her unlawful dismissal to the date she would have worked or voluntarily retired as well as exemplary damages.

It is the further contention of Plaintiff-Appellant-Petitioner that the trial court erred in failing to take into account the testimony of all witnesses who appeared on behalf of the Plaintiff-Appellant-Petitioner at the De Novo Hearing.

Specifically, Mr. Edward Hughes came from Washington, D.C. to testify at the time of the De Novo Hearing and testified on behalf of Plaintiff-Appellant-Petitioner. Nowhere during the course of the Memorandum Opinion dated December 5, 1975, does Judge Feikens even mention Mr. Hughes' appearance, let alone his testimony under oath.

It is the position of the Plaintiff-Appellant-Petitioner that even though the Trial Court has the power to use its discretion to believe certain witnesses and discount others, the failure of the Court to even mention Mr. Hughes appearance clearly indicates that the testimony of Mr. Hughes was not considered by the Court.

#### **F.**

**If review of the judgment of a State Court is sought the statement of the case shall also specify the stage and the proceedings in the Court of the first instance and in the Appellate Court, at which, and the manner in which, the Federal Question sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the Court; such pertinent quotations from specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the**

**Court's charge and exception thereto, assignment of errors) as will show that the Federal Question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.**

Plaintiff-Appellant-Petitioner states that her initial Complaint alleged violations of the First Amendment to the Constitution. That issue has been raised throughout the proceedings, and was raised in the De Novo before Judge Feikens, a copy of the Memorandum of Opinion is attached hereto, and further before the United States Court of Appeals for the Sixth Circuit.

The Federal Questions were raised by pleading, and the above-described statement of facts makes reference to certain portions of the records in which the issues were raised.

#### **G.**

**If review of the judgment of a Federal Court is sought, the statement of the case shall also show the basis for Federal jurisdiction in the Court of first instance.**

Federal Question jurisdiction based upon the First Amendment to the Constitution.

#### **H.**

**A direct and concise argument amplifying the reasons relied on for the allowance of the Writ.**

It is the position of Plaintiff-Appellant-Petitioner that the issues raised by this appeal are so fundamental for the protection of the liberties specifically protected by the First Amendment to

the United States Constitution that this Court should grant a Writ of Certiorari to hear oral argument on the question of whether or not the Plaintiff-Appellant-Petitioner was dismissed from her employment based on violations of the First Amendment.

More specifically it is the contention of Plaintiff-Appellant-Petitioner that her dismissal from the United States Customs Service, shortly before she would have reached the age and time requirements for retirement, was based upon the fact that her direct supervisor, Mr. Kenneth Aschim, and other personnel in the Detroit Office in the United States Customs Service discriminated against the Plaintiff-Appellant-Petitioner on the basis of her religious beliefs and intentionally "built" a case for her removal.

**I.**

There shall be appended to the Petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of Courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. The opinions shall include the caption showing the name of the Court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the Petition is voluminous, it may, if more convenient, be separately presented.

Same are being submitted with this Petition for this Writ of Certiorari.

**J.**

If review of the judgment or decree of a State Court is sought, there shall also be appended to the Petition a copy of the judgment or decree in question and any order on rehearing; and, if review of the judgment or decree of a Federal Court is sought, there shall similarly be appended a copy of such judgment or decree and any order on rehearing, which may however be limited to the portions thereof sought to be reviewed. The judgment, decrees, or orders on rehearing shall include the caption showing the name of the Court issuing the same, the title and number of the case, and the date of entry of such judgment, decree and order.

Reference is made to Petitioner's attached Appendix Exhibits A, B, C, D.

Respectfully submitted,

GOLDSTEIN, MEKLIR & FELDMAN, P.C.

By: \_\_\_\_\_  
Murray R. Feldman (P23274)  
Attorney for Plaintiff  
202 Travelers Tower  
Southfield, Michigan 48076  
358-4660



## Appendix A

### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

MARIE D. GUST,  
Plaintiff,  
vs.  
U. S. CUSTOMS SERVICE,  
Defendant.

Civil Action  
No. 5-70328

#### MEMORANDUM OPINION

Plaintiff Marie D. Gust, a Jehovah's Witness, was discharged from her position as a clerk-stenographer with the United States Customs Service in October, 1973. Her claim that this discharge constituted religious discrimination was denied by the Director of the Equal Opportunity Program for the Department of the Treasury upon the recommendation of a Complaints Examiner of the Civil Service Commission after a hearing held on June 18, 1974. On appeal to the Appeals Review Board of the Civil Service Commission, this decision was affirmed in an opinion dated January 20, 1975. Within the statutory thirty-day period, plaintiff filed a civil action in this court seeking review of this administrative decision under 42 U.S.C. § 2000e-16(c).

Plaintiff contends that the administrative hearing was inadequate, primarily because Mr. Rice, her representative at the hearing, was not an independent attorney of her choosing, but rather an employee of the National Customs Service Association. In essence, she claims that Mr. Rice failed to prosecute her

claim vigorously, failed to call witnesses on her behalf and conducted an inadequate cross-examination of the witnesses called by the Customs Service. In order to introduce evidence more favorable to her claim, plaintiff seeks either a rehearing at the administrative level or a trial de novo in this court.

Since the parties are presently before this court and a remand to the hearing examiner would only serve to begin anew the process that has taken more than a year to reach this stage, a trial de novo would appear to be the more advantageous of the two alternatives. In its motion for summary judgment, however, the Customs Service (hereinafter defendant) contends that plaintiff is not entitled to a trial de novo under 42 U.S.C. § 2000e-16(c). Defendant places primary reliance upon the case of *Hackley v. Johnson*, 360 F. Supp. 1247 (D.D.C. 1973). That case involved a claim of racial discrimination by employees of the Federal Government under § 2000e-16(c), and Judge Gesell was called upon to decide the then novel issue of whether a trial de novo was required by the Act. It is clear that a right to a trial de novo exists in actions against private employers under § 2000e-5(f) (1). See *Alexander v. Gardner-Denver Co.*, 415 U.S., 36, 38 (1974). It is also true that § 2000e-16(c) provides for a "civil action as provided in section 2000e-5 of this title." However, the legislative history of § 2000e-16 indicates that the provision was intended to make available to the aggrieved federal employee "an action in U.S. District Court for a review of the administrative proceeding record after a final order by his agency or by the Civil Service Commission." 360 F. Supp. at 1251-52, quoting the remarks of Senator Williams at 118 Cong. Rec. S 2280 (daily ed. Fed. 22, 1972). In view of this history Judge Gesell stated:

"The Federal Courts are free to act in whatever manner may be appropriate, case by case, consistent with experience and precedent . . . .

"The trial de novo is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F. Supp at 1252.

This court is in complete accord with Judge Gesell's flexible approach to the difficult, sensitive problems presented by a claim of discrimination. While a trial de novo is not an absolute right in all cases brought under § 2000e-16(c), a federal district court must have the authority to take additional testimony where appropriate and helpful in the review of an inadequate record.

The court finds, moreover, that the record compiled in this case is inadequate to permit a proper review of the question of religious discrimination:

(a) Complainant, Marie Gust, repeatedly requested an opportunity to use a diary she had maintained to aid her in her testimony. Neither her attorney nor the Complaints Examiner took any cognizance of these requests. The diary might have been used to refresh recollection or it might have been admitted as evidence of past recollection recorded. This is important in view of the finding that the evidence of record does not support complainant's allegation of religious discrimination.

(b) No reason is given why the Complaints Examiner ruled that only complainant and one witness (Perry Dayton) would be allowed to testify on her behalf. The record is not clear if Homer Rice appeared at the pretrial conference at which this ruling was made. In any event, he did not object to the ruling at the hearing.

(c) Witnesses who might have been called were not called; witnesses who might carefully have been examined as to complainant's allegations were not so examined.

Accordingly, defendant's motion for summary judgment is denied, and the case will be set down for an evidentiary hearing.

An appropriate order may be submitted.

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JOHN FEIKENS  
United States District Judge

DATED: Detroit, Michigan  
September 19, 1975

A TRUE COPY

HENRY R. HANSSEN, Clerk

By: \_\_\_\_\_  
Deputy Clerk

## Appendix B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MARIE D. GUST,

Plaintiff

vs.

CIVIL ACTION NO: 75-70328

THE UNITED STATES CUSTOMS SERVICE,

Defendant.

### MEMORANDUM OPINION

Marie D. Gust brought this action under 42 U.S.C. § 2000e-16(c) for judicial review of the denial by the Civil Service Commission of her claim that her discharge in October, 1973 from her position as clerk-stenographer constituted religious discrimination. In a Memorandum Opinion dated September 19, 1975, this court granted plaintiff a de novo hearing in order to supplement an inadequate administrative record, to permit plaintiff an opportunity to be represented by competent counsel of her own choosing, to permit plaintiff to refer to her diary for evidence in support of her claim, and to permit plaintiff to call witnesses in her behalf. This hearing was held on December 5, 1975.

Plaintiff was discharged on October 5, 1973, on the basis of a recommendation made by Kenneth E. Aschim, her supervisor. Aschim charged plaintiff with failure to follow instructions and inefficiency in performing her job. Plaintiff claims that these charges constituted a sham designed to disguise the true motiva-

tion for her discharge: her adherence to the Jehovah's Witness faith. The court must decide whether plaintiff has carried her burden of making out a prima facie case of religious discrimination.

Aschim testified that he sometimes gave plaintiff unsatisfactory performance readings during the period 1966-72. (Tr. 53). He stated that in 1966-67 "she was slow in her typing; her shorthand was not acceptable; she was slow on filing." (Tr. 63). In 1968, plaintiff filed a complaint charging religious discrimination. (Tr. 66). Aschim attempted to remove plaintiff from her position in 1970, but the removal procedure was withdrawn because plaintiff's 1968 complaint had not been resolved. (Tr. 67-68). Aschim testified that plaintiff complained to him that other employees were making derogatory remarks about her religion, but that she refused to divulge their names. He responded to her complaints by calling the other employees into his office and ordering any such remarks to be stopped. (Tr. 71). Gary D. Liming, a special agent with the U.S. Customs Service who worked in the same office as did plaintiff, substantially corroborated the testimony given by Aschim. He stated that plaintiff complained on occasion that other employees were making comments to her, but that she would not identify them. (Tr. 99-100). As was the case with Aschim, Liming testified that he responded to plaintiff's complaints by telling the other employees "if any of you are doing it, cease and desist." (Tr. 101). While Liming had little recollection of plaintiff's performance ratings, he did state that "(t)hey were marginal all the way through." (Tr. 108). He testified that "one of her shortcomings was inability to take shorthand at an adequate rate," (Tr. 109), and that "(h)er typing was slow and her ability to get a job done in a reasonable length of time was very slow." (Tr. 110).

Plaintiff's own testimony described personal conflicts with Helen Greenwood, a fellow typist in the office, involving comments arguably reflecting adversely on plaintiff's religion.



(Tr. 123-24). The remainder of her testimony, however, related in general terms what are most appropriately described as personality conflicts with her fellow employees. For example, she stated that on one occasion a fellow worker read aloud from "The Happy Hooker," which plaintiff regarded as "complete vulgarity." Plaintiff construed this as religious discrimination "(b)ecause some of it is against my religion, to listen to some of that stuff." (Tr. 144).

The court finds that plaintiff's testimony, accepted as true, describes at most a situation in which she was harassed by her fellow workers because of her religious beliefs. She did not, however, provide her supervisors with the identity of those guilty of such harassment, and for this reason corrective action was of necessity limited to general admonitions to the other employees. The court finds further that plaintiff's job performance was substandard, and that this inadequacy of job performance was the sole reason for plaintiff's discharge. The court therefore holds that the defendant U.S. Customs Service did not violate 42 U.S.C. § 2000e-16(a), and that plaintiff's discharge was not the result of discrimination based on religion.

An appropriate order may be submitted.

\_\_\_\_\_  
JOHN FEIKENS  
United States District Judge

DATED: Detroit, Michigan  
MARCH 15, 1976

A TRUE COPY

HENRY R. HANSSEN, CLERK

By: \_\_\_\_\_  
Deputy Clerk

## Appendix C

IN THE SUPREME COURT OF THE  
UNITED STATES  
ON APPEAL  
FROM THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT

MARIE GUST,

Plaintiff,

vs.

U.S. CUSTOMS SERVICE,

Defendant.

District Court

No: 75-70328

Court of Appeals

No: 76-1762

### NOTICE TO CERTIFY AND TRANSMIT RECORD

NOW COMES the above-named Plaintiff-Appellant, and requests that the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit to transmit the entire record transmitted to it from the United States District Court for the Eastern District of Michigan to the United States Supreme Court, including a numbered list of documents, identifying each with reasonable definiteness.

This request is in conjunction with a Petition for Certiorari which is presently being filed with the United States Supreme Court in the above-captioned matter.

This certification is requested under Rule 21 of the Supreme Court Rules.



Respectfully submitted,

GOLDSTEIN, MEKLIR & FELDMAN, P.C.

By: \_\_\_\_\_

Murray R. Feldman (P23274)  
Attorney for Plaintiff-Appellant  
202 Travelers Tower  
Southfield, Michigan 48076  
358-4660

## Appendix D

IN THE SUPREME COURT OF THE  
UNITED STATES  
ON APPEAL  
FROM THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT

MARIE GUST,

Plaintiff,

vs.

U.S. CUSTOMS SERVICE,  
Defendant.

District Court  
No: 75-70328

Court of Appeals  
No: 76-1762

## PROOF OF MAILING

STATE OF MICHIGAN    )  
                                  ) SS  
COUNTY OF OAKLAND )

Leslie Hoyt, being first duly sworn, deposes and says that on the \_\_\_\_\_ of February, 1978, she mailed a copy of the Notice to Certify and Transmit Record to Clerk of the United States District Court of the Eastern District of Michigan, 133 U.S. Court House, Detroit, Michigan 48226 and the Clerk of the U.S. Court of Appeals, Sixth Circuit, U.S. Courthouse, Cincinnati, Ohio 45202, by placing same in a sealed envelope addressed as indicated and depositing said envelope in the U.S. Mail receptacle located in the Lobby of the Travelers Tower with sufficient postage attached thereto and fully prepaid.

\_\_\_\_\_  
Leslie Hoyt

Subscribed and sworn to before  
me this \_\_\_\_\_ day of February, 1978.

\_\_\_\_\_  
Notary Public, Oakland County, MI.  
My Commission Expires: 1/7/81

**Appendix E**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

MARIE D. GUST,  
Plaintiff-Appellant  
vs.  
U.S. CUSTOMS SERVICE,  
Defendant-Appellee  
Before: EDWARDS and ENGEL, Circuit Judges and NEESE,  
District Judge\*  
ORDER  
Court of Appeals  
No: 76-1762

This is an appeal from the judgment of the district court denying relief to plaintiff in her action brought under 42 U.S.C. § 2000 e-16(c). The complaint alleged that she had been unlawfully discharged in October, 1973, from her position as a clerk-stenographer for the United States Customs Service as a result of religious discrimination. She is a follower of the Jehovah's Witness religion.

Following an evidentiary hearing on the merits, the district court held that plaintiff's discharge was not the result of discrimination based on her religion, but was caused by her poor work record.

Upon review, it is apparent that the findings of the district judge are supported by substantial evidence and are not clearly erroneous. For the reasons stated by United States District Judge John Feikens in his memorandum opinion of March 15, 1976,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT  
John P. Hehman, Clerk

\_\_\_\_\_  
Deputy Clerk

\*Hon. C. G. Neese, Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

No. 77-1508

Supreme Court, U. S.

FILED

MAY 26 1978

MICHAEL BODAK, JR., CLERK

*In the Supreme Court of the United States*

OCTOBER TERM, 1977

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MARIE D. GUST, PETITIONER

v.

UNITED STATES CUSTOMS SERVICE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-1508

MARIE D. GUST, PETITIONER

v.

UNITED STATES CUSTOMS SERVICE

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

---

MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION

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1. Petitioner, a Jehovah's Witness, was discharged from her position as a clerk-stenographer with the United States Customs Service in October 1973 (Pet. App. 14). She claimed that she was discharged solely because of her religion. After a hearing held on June 18, 1974, the Department of the Treasury found no merit to her claim (*ibid.*). The Appeals Review Board of the Civil Service Commission affirmed the determination on January 20, 1975 (*ibid.*).

Petitioner then filed this suit in the United States District Court for the Eastern District of Michigan. Following an evidentiary hearing, the district court held that petitioner was discharged because of her unsatisfactory work record, not because of her religion (Pet. App. 18-20). The court of appeals affirmed (Pet. App. 25).



2. Although petitioner contends (Pet. 7-10, 11-12) that she was dismissed from her federal employment because of her religious beliefs, her contention is unsupported by the record. The district court, after supplementation of the administrative record and a full hearing, specifically found (Pet. App. 20) that "[petitioner's] job performance was substandard, and that this inadequacy of job performance was the sole reason for [petitioner's] discharge." The court of appeals held (Pet. App. 25) that this finding is not clearly erroneous.

This Court has frequently stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director*, 385 U.S. 630, 635; *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2. There is no such showing here. Petitioner simply argues that her explanation of her dismissal should be preferred to that of her supervisor and a co-worker, both of whom testified that her work was unsatisfactory (Pet. App. 19). The district court was entitled to credit their testimony.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

MAY 1978.